








even seriously question whether Glendale really will construct the Miami facility specified in its application.

79. An application for construction permit implicitly represents that the applicant will construct expeditiously after grant. Sunrise Broadcasting, Inc., 100 FCC 2d 1565, 1567 (MMB



80. This raises an obvious and disturbing question: how can the Commission rely on George Gardner to follow through and build the facility for which he is applying in this proceeding? He has already failed to build not one, not two, not three, but four broadcast stations -- and has never told the Commission why. With this sorry and unstable history he now asks the Commission to take another authorization away from an existing operator and award it to him.

81. Under the circumstances, an issue must be designated to determine why Gardner has recently failed to build so many other stations, and whether, in light thereof, he is reasonably likely to build the station he seeks here.<sup>26/</sup> The public interest is disserved when construction permits lie fallow. Thus, when an applicant comes with a track record of non-construction, a substantial and material question is presented for hearing. The issue here should be framed as follows:

"To determine the facts and circumstances surrounding the failure of Raystay Company to construct and operate low power television stations of which it has been the permittee and, in light thereof, whether it is reasonably likely that Glendale

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<sup>26/</sup> Relevant to this inquiry is whether Gardner lacked the funds to build his LPTV stations, because if so, that would call into question the bona fides of Glendale's certification that Gardner would finance the construction and initial operation of Glendale's proposed Miami station. See Glendale Application, Section III and Ex. 4. Another relevant inquiry is whether Gardner was simply acquiring construction permits with the intent to try to sell them, as he did one LPTV permit for York/Red Lion, Pennsylvania. See Glendale Amendment filed February 13, 1992.

Broadcasting Company would timely construct the facility for which it seeks authorization in BPCT-911227KE."

J. Summary of Requested Issues

82. Summarizing the foregoing, Glendale's qualifications to be a licensee are seriously impugned by George Gardner's history of deceitful dealing with this Commission. He has already been found to have made misrepresentations in an earlier licensing proceeding. While claiming to be "rehabilitated," he continues to exhibit a penchant for dishonesty, both in this proceeding and in other Commission matters. He repeatedly lied to the Commission over a period of three years in LPTV applications. He falsely certified both his site availability and his financial qualifications in Glendale's application. And he has committed multiple violations of the Commission's reporting requirements. All of this exposes his professed "rehabilitation" as a sham. Beyond that, Glendale lacks an available transmitter site. Moreover, given Gardner's history of unbuilt LPTV stations, there is no assurance that Glendale

(1) "To determine (a) whether the submission made in Glendale's application regarding the rehabilitation of George F. Gardner is of sufficient scope and currency to meet the standards for rehabilitation submissions prescribed for Mr. Gardner by the Commission in RKO General, Inc. (WAXY-FM), and (b) if not, whether Glendale has made an adequate threshold showing that Gardner is currently qualified;"

(2) "To determine whether Glendale Broadcasting Company is qualified to be a Commission licensee in light of the findings and conclusions concerning misrepresentation

(8) "To determine whether George F. Gardner made misrepresentations and/or lacked candor in violation of Section 73.1015 of the Commission's Rules in 'rehabilitation' statements he made to the Commission in March 1990 and May 1990 and, if so, the effect thereof on Glendale's qualifications to be a licensee;"

(9) "To determine whether Glendale made misrepresentations and/or lacked candor in violation of Section 73.1015 of the Commission's Rules in reaffirming the 'rehabilitation' statements made by George F. Gardner to the Commission in March 1990 and May 1990 and, if so, the effect thereof on Glendale's qualifications to be a licensee;" and

(10) "To determine the facts and circumstances surrounding the failure of Raystay Company to construct and operate low power television stations of which it has been the permittee and, in light thereof, whether there is reasonable assurance that Glendale Broadcasting Company would timely construct the facility for which it seeks authorization in BPCT-911227KE."

#### **K. Burden of Proceeding and Proof**

84. On all of the foregoing issues, the burden of proceeding and burden of proof should be placed on Glendale, because the operative facts with respect to these issues are peculiarly within the knowledge of that applicant and its principals. TeleSTAR, Inc., 3 FCC Rcd 2860, 2861 (§13) (1988).

#### **L. Forfeiture Notice**

85. Under current Commission policy, an applicant or other party found to have made misrepresentations or lacked candor

before the Commission will be subject to forfeiture payment(s) as an alternative or in addition to any other Commission action. Section 1.80(a)(2) of the Rules provides that a forfeiture may be assessed against "any person" for willfully or repeatedly

more broadly to "any person" (see §1.80(a)). Under §1.80(g), a hearing that is "being held for some reason other than the assessment of a forfeiture" may also encompass forfeiture penalties where warranted. Although George Gardner (individually) and Raystay Company are not applicants in this proceeding, they are directly related to the applicant (Glendale) and their alleged misconduct will bear directly on Glendale's qualifications. Hence, as "persons" who may be assessed forfeitures if found to have willfully or repeatedly

Gardner are potentially liable for the following forfeitures, respectively, for violations of the obligation of truthfulness under Section 73.1015 of the Rules (§ references are to paragraphs in this Motion):

<u>Party</u>	<u>Violation</u>	<u>§ Ref.</u>	<u>Amount</u>
Glendale	False site certification in BPCT-911227KE (Miami application)	19-24	\$250,000
Glendale	False financial certification in BPCT-911227KE (Miami application)	33-39	\$250,000
Glendale	Misrepresentation and/or lack of candor in Exhibit 2 of BPCT-911227KE ("rehabilitation" submission) (Miami application)	75-77	\$250,000
Raystay	False site certification in BPTTL-890309PA (Lancaster LPTV CP application)	52-67 73-74	\$250,000
Raystay	False site certification in BPTTL-890309NY (Lancaster LPTV CP application)	52-67 73-74	\$250,000
Raystay	False site certification in BPTTL-890309TD (Lebanon LPTV CP application)	52-58 68-74	\$250,000
Raystay	False site certification in BPTTL-890309NZ (Lebanon LPTV CP application)	52-58 68-74	\$250,000
Raystay	Misrepresentations in BMPTTL-911220JB (first Lancaster LPTV extension application)	63-67	\$250,000
Raystay	Misrepresentations in BMPTTL-911220IX (first Lancaster LPTV extension application)	63-67	\$250,000



Raystay	Misrepresentation in BMPTTL-911220JI (first Lebanon LPTV extension application)	68-72	\$250,000
Raystay	Misrepresentations in BMPTTL-911220JF (first Lebanon LPTV extension application)	68-72	\$250,000
Raystay	Misrepresentations in BMPTTL-920709IN (second Lancaster LPTV extension application)	63-67	\$250,000
Raystay	Misrepresentations in BMPTTL-920709IM (second Lancaster LPTV extension application)	63-67	\$250,000
Raystay	Misrepresentations in BMPTTL-920709IJ (second Lebanon LPTV extension application)	68-72	\$250,000
Raystay	Misrepresentations in BMPTTL-920709IK (second Lebanon LPTV extension application)	68-72	\$250,000
Gardner	Misrepresentations and/or lack of candor in rehabilitation promises made in declaration under penalty of perjury filed March 14, 1990, with BPTTL- 890309PA <u>et al.</u>	75-77	\$250,000
Gardner	Misrepresentations and/or lack of candor in rehabilitation promises made in declaration under penalty of perjury filed May 7, 1990. with RPTTL-	75-77	\$250,000

Raystay Company and George Gardner as parties and giving notice of liability for forfeitures:

"IT IS FURTHER ORDERED, that Raystay Company and George F. Gardner ARE MADE PARTIES to this proceeding;"

and

"IT IS FURTHER ORDERED, that irrespective of whether the hearing record warrants an Order denying Glendale's application (BPTC-911227KE), it shall be determined pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER FOR FORFEITURE in an amount not to exceed \$250,000 per continuing violation shall be issued against any or all of Glendale, Raystay Company, and/or George F. Gardner for willful and/or repeated violations of Section 73.1015 of the Commission's Rules, which occurred or continued within the applicable statute of limitations."

**M. Document Production Requests**

89. Although not required in comparative renewal cases (as opposed to cases involving applications for only new facilities),<sup>28/</sup> TBF is today also filing a separate motion for production of documents related to the issues requested in this contingent motion to enlarge. See accompanying "Contingent Motion for Production of Documents." TBF is following this procedure so as to expedite the pre-hearing phase of the case by enabling the Presiding Judge to decide the motion to enlarge and rule on associated document requests at the same time.

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<sup>28/</sup> See 47 C.F.R. §1.229(g).

**N. Conclusion**

90. For the reasons stated above, if the application of Glendale Broadcasting Company is not dismissed at the threshold as ungrantable for lack of an available transmitter site, this contingent motion should be granted and the issues specified herein should be designated for hearing.

Respectfully submitted,

TRINITY BROADCASTING OF FLORIDA,  
INC.

By: 

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Joseph E. Dunne, III

May & Dunne, Chartered  
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Washington, D.C. 20007  
(202) 298-6345

By: 

Nathaniel F. Emmons  
Howard A. Topel  
Christopher A. Holt

Mullin, Rhyne, Emmons and Topel,  
P.C.  
1000 Connecticut Ave. - Suite 500  
Washington, D.C. 20036-5383



**ATTACHMENT 1**

**Exhibit 1 of Glendale Application (Portion)**

STOCKHOLDERS AGREEMENT  
OF  
GLENDALE BROADCASTING COMPANY  
(a Close Corporation)

By this Stockholders Agreement (the "Agreement") of GLENDALE BROADCASTING COMPANY, dated as of December 6, 1991, George F. Gardner and Mary Anne Adams (the "stockholders"), now agree as follows:

1. Company. The parties have agreed to form a Delaware close corporation pursuant to Section 341 et seq. of the Delaware Corporation Law. These provisions shall govern the rights and liabilities of the Company, except as otherwise stated herein, or in the Company's By-Laws, or Certificate of Incorporation.

2. Name. The name of the Company is Glendale Broadcasting Company.

3. Purpose. The Company is being formed for the purpose of prosecuting an application before the Federal Communications Commission for a construction permit for a TV broadcast station to operate on Channel 45 at Miami, Florida, for constructing and operating a TV station on that frequency, and to do any and all other things determined by the stockholders to be necessary, desirable or incidental to the foregoing primary purpose, and to engage in such activities incidental or auxiliary thereto as the stockholders may deem advisable.

4. Place of Business. The initial principal office and place of business of the Company shall be located at 469 E. North, Carlisle, PA 17013. The

Company's registered agent in Delaware and an authorized agent for service of process is the Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware.

5. Dissolution. The Company may be dissolved and terminated if stockholders holding in the aggregate 51% of the common voting stock of the Company so agree.

6. Directors. The stockholders agree that George F. Gardner and Mary Anne Adams shall be the initial Directors.

7. Officers. The stockholders agree that the Company shall have the following initial officers:

George F. Gardner	President, Treasurer
469 E. North	Secretary
Carlisle, PA 17013	

Mary Anne Adams	Vice President,
469 E. North	Assistant Secretary,
Carlisle, PA 17013	Assistant Treasurer

8. Issuance of Shares. Each stockholder's ownership interest in the Company is set forth below:

George F. Gardner	51 Shares of
	\$10 Par Common Stock

Mary Anne Adams	49 Shares of
	\$10 Par Common Stock

9. Loans by George F. Gardner. The stockholders acknowledge that George Gardner has advanced \$40,000 to provide for the filing of the application for authority to operate on Channel 45. The Company will return

this sum to Gardner, plus 9% interest, promptly upon the organization of the Company.

Gardner will loan to the Company up to \$350,000 for purposes of prosecuting the application for operation on Channel 45. The sum will be dispersed as determined by the Company's Board of Directors.

10. Financing the Construction and Initial Operation of the Station. The stockholders acknowledge that the Company may be securing a letter from a financial institution in connection with the construction and operation of the Company's proposed TV station Channel 45 in Miami. In that event each stockholder agrees to personally guarantee any loan made by the financial institution to the Company, if this is required by the financial institution. If the Company does not finance the construction and operation of the television station by securing a letter from a financial institution, Gardner agrees to loan the required funds to the Company. The terms of the loan will be determined whenever the funds are needed.

12. Distribution of Profits. The net profits derived from the operation of the Company property shall be distributed among the stockholders in proportion to their equity interests. Before making any actual distribution, the Directors shall set aside from the income of the Company adequate reserves to meet





**ATTACHMENT 2**

**RKO General, Inc. (WAXY-FM), 2 FCC Rcd 3348 (Portion)**

Before the  
Federal Communications Commission  
Washington, D.C. 20554

PARTIAL INITIAL DECISION OF ADMINISTRATIVE  
LAW JUDGE JOSEPH STIRMER

Issued: May 15, 1987;

Released: June 4, 1987

In re Applications of

RKO GENERAL,  
INC. (WAXY-FM)  
Fort Lauderdale,  
Florida  
For Renewal of License

MM DOCKET NO. 84-1112  
File No. BRH-781002WR

ADWAVE  
COMPANY  
Fort Lauderdale,  
Florida

MM DOCKET NO. 84-1113  
File No. BPH-830510AL

SOUTH JERSEY  
RADIO, INC.  
Fort Lauderdale,  
Florida

MM DOCKET NO. 84-1114  
File No. BPH-830511AK

COZZIN  
COMMUNICATION  
CORPORATION  
Fort Lauderdale,  
Florida

MM DOCKET NO. 84-1116  
File No. BPH-830512AW

Rosemarie A.  
Reardon d/b/a  
LAUDERSEA  
BROADCASTING  
COMPANY  
Fort Lauderdale,  
Florida

MM DOCKET NO. 84-1118  
File No. BPH-830512CP

For Construction Permit  
for a New FM Station

Appearances

*John Payton, Esquire* on behalf of RKO General, Inc.;  
*Lewis I. Cohen, Esquire* on behalf of Adwave Company;  
*Alfred C. Cordon, Esquire* and *Dennis J. Kelly, Esquire* on  
behalf of South Jersey Radio, Inc.; *Janice C. Orr, Esquire*  
on behalf of Cozzin Communication Corporation; *Margot*  
*Polivy, Esquire* on behalf of Rosemarie A. Reardon, d/b/a  
Laudersea Broadcasting Company; and *Larry A. Miller, Es-*  
*quire* on behalf of the Chief, Mass Media Bureau, Federal  
Communications Commission.

PRELIMINARY STATEMENT

1. By *Memorandum Opinion and Order*, FCC 84-541, released December 6, 1984 (HDO), the Commission designated for comparative hearing the license renewal application of RKO General, Inc. (RKO), for FM broadcast station WAXY-FM, Fort Lauderdale, Florida, and various mutually exclusive applications to operate on the same channel. The following mutually exclusive applicants remain in this proceeding: RKO General, Inc. (RKO); Adwave Company (Adwave); South Jersey Radio, Inc. (South Jersey); Cozzin Communication Corporation (Cozzin); and Rosemarie A. Reardon, d/b/a Laudersea Broadcasting Company (Laudersea).<sup>1</sup>

2. The Commission indicated that the hearing would initially be limited to the basic qualifications of the competing applicants other than RKO. Thereafter, the Commission modified its original Order to require full comparative hearings as to all competing applicants other than RKO. *RKO General, Inc.*, FCC 85-80 at paragraph 8.

3. By *Memorandum Opinion and Order*, FCC 85M-3484, released September 6, 1985, the Presiding Judge specified the following issues against Laudersea:

(a) To determine the cost estimates for prosecution, construction and operation of the facility proposed by Laudersea and whether its available bank loan commitment is sufficient to render that applicant financially qualified;

(b) To determine whether Rosemarie A. Reardon, d/b/a Laudersea Broadcasting Company, either misrepresented facts, was lacking in candor or was grossly negligent in certifying that she was financially qualified and, if so, the effect thereof on her basic and/or comparative qualifications to be a Commission licensee.

The burden of proceeding and the burden of proof on these two issues was placed on Laudersea.

4. By *Memorandum Opinion and Order*, FCC 85M-3835, released October 2, 1985, the Presiding Judge specified the following issue against Adwave:

To determine whether Adwave or Mr. George Gardner misrepresented facts or was lacking in candor in making its divestiture commitment to the Commission and if so, the effect thereof on the applicant's basic and/or comparative qualifications.

The burden of proceeding and the burden of proof on this issue was placed on Adwave.

5. In addition to the foregoing issues, as a result of the addition of issues against Cozzin in the RKO Boston proceeding (FCC 85M-890), the Presiding Judge ruled that the same issues would be specified herein, but that

trial of such issues would be held in the Boston proceeding with the findings and conclusions controlling in this proceeding. (See, FCC 85M-1076).

6. Prehearing conferences were held on February 5, March 14, April 24, and October 9, 1985. Hearing sessions were held in Washington, D.C., on July 10 and 11, 1985, on the comparative issue and on January 22 and 23 and February 13, 1986, on the added issues. The record was closed on February 13, 1986 (Tr. 836). Proposed Findings of Fact and Conclusions of Law were filed by the parties on May 2, 1986.<sup>2</sup> Reply Findings were filed by RKO, Adwave, Lauderdale and South Jersey on May 22, 1986. Thereafter, the Commission directed that this case, as well as other RKO cases (except the KHJ-TV case), be held in abeyance. See, FCC 86-383, released September 12, 1986. By Order of the Commission, released March 16, 1987 (FCC 87-887), the Commission's earlier Order was modified, and the proceedings held in abeyance were ordered reactivated.

#### FINDINGS OF FACT ADWAVE COMPANY (ADWAVE)

##### The Applicant

7. Adwave Company (Adwave) is a Florida corporation, wholly owned and controlled by George F. Gardner, its president, a director and 100 percent stockholder (Tr. 202; Adwave Ex. 1 at 1). Mr. Gardner's son, David Gardner, is corporate secretary (Tr. 155). Adwave has no interests other than this application (Tr. 202).

##### Diversification

8. Mr. Gardner is president, treasurer and a director of Raystay Company (Raystay), which owns and operates cable television systems serving Carlisle, Mount Holly Springs, Boiling Springs, Waynesboro and neighboring areas in Pennsylvania (Tr. 110; Adwave Ex. 1 at 1; Adwave Ex. 5 at 1). Raystay is also sole owner of Inwood TV Cable Company, which holds a franchise to operate cable systems presently being constructed in Berkeley County, West Virginia (Tr. 203-204). The other officers and directors of Raystay are Mr. Gardner's wife, Marian Gardner, who is secretary and a director, and Mr. Gardner's son, David, who is vice president and a director (Tr. 117, 232-233; Adwave Ex. 5 at 1).

9. Raystay has always been wholly owned by the Gardner family and operates as a family business (Tr. 198, 218). Mr. Gardner controls Raystay through his majority stock ownership (Tr. 200; Adwave Ex. 1 at 1). Raystay has two classes of stock: Class A, which is voting, and Class B, which is nonvoting (Tr. 483). Mr. Gardner owns 50.1 percent of the Class A stock of Raystay, while Mrs. Gardner owns 25.9 percent of the Class A stock. Two of his children, David and Michael Gardner, each own 8 percent of the Class A stock; the remaining 8 percent of the Class A stock is held in trust by David Gardner for another of Mr. Gardner's children, Jon Gardner (Tr. 135-136; Adwave Ex. 5 at 1). Mr. Gardner gave the stock to his children. In addition, five of Mr. Gardner's children and two of his grandchildren own Class B stock in Raystay (two in trust arrangements with David Gardner as trustee) (Tr. 134; Adwave Ex. 5 at 1-2). The Class B stockholders have no voting control over Raystay (Tr. 511). The principal equity value of Raystay, however, is in the Class B stock (Tr. 484, 497-498).

10. Mr. Gardner is president, treasurer, a director and until 1984 was 100 percent stockholder of TV Cable of Waynesboro, Inc., which owns and operates cable television facilities serving Washington County, Maryland (Adwave Ex. 1 at 1). As of October 26, 1984, Mr. Gardner transferred all the outstanding stock of TV Cable of Waynesboro, Inc., to Raystay (Adwave Ex. 1 at 1).

11. Until 1984, Mr. Gardner was president, a director and 90 percent stockholder of West Shore Broadcasting Company, which owned and operated cable television facilities serving Quincy Township and Franklin County in Pennsylvania (Tr. 206, 207; Adwave Ex. 1 at 1). His son David held the remaining 10 percent of the stock of West Shore Broadcasting (Tr. 204). Mr. Gardner, on October 22, 1984, transferred the assets of West Shore Broadcasting Company to Raystay and subsequently dissolved the corporation (Tr. 204-207, 521; Adwave Ex. 1 at 1).

##### Misrepresentation/Lack of Candor Issue

12. Mr. Gardner amended Adwave's application on March 27, 1984, the "B" cut-off date, to state that:

In the event Adwave Company is awarded a construction permit for a new FM broadcast station at Fort Lauderdale, Florida, George F. Gardner and his wife, Marion [sic] Gardner, will divest themselves of all of the stock they own in Raystay Company.

In the event Adwave Company is awarded a construction permit for a new FM broadcast station at Fort Lauderdale, Florida, George F. Gardner will divest himself of all the stock he owns of TV Cable of Waynesboro, Inc., and West Shore Broadcasting Co.

(Tr. 489; Adwave Ex. 6 at 1; RKO Ex. 1). Mr. Gardner was aware that divesting of his stock was a factor the Commission would consider in awarding the license (Tr. 489-490). After reviewing the applications of other parties to determine how Adwave's application compared with them, Mr. Gardner decided to amend his application to include the commitment to divest (Tr. 162-163). Mr. Gardner made this commitment for the sole purpose of gaining a comparative advantage over other applicants for WAXY (Tr. 143-45, 480-481). Mr. Gardner discussed the amendment with his communications counsel, who drafted it for his signature (Tr. 508). This amendment was reviewed by Mr. Gardner, shown to his wife, Marian, and signed by him prior to its filing with the F.C.C. (Tr. 163-164, 508, 518).

13. In its December 6, 1984, Order designating these applications for hearing, the Commission required, in the event of a grant of the Adwave application, that:

Prior to the commencement of operation of the station authorized herein, permittee shall certify to the Commission that the principals of Adwave have divested all stock ownership in Raystay Company, TV Cable of Waynesboro, Inc., and West Shore Broadcasting Company.<sup>3</sup>

Mr. Gardner understands that the condition placed on his application by the Commission with regard to divestiture required him to "... take the ownership characteristics of the stock out of [his] hands ..." (Tr. 165).

14. In his direct case exhibit, Gardner again stated:

In the event that Adwave's application is granted, my wife and I will divest ourselves of all the stock we own in Raystay.

15. Mr. Gardner testified that by divesting, he meant that he would give up voting control of the Raystay stock under the terms of an Agreement of Trust (Tr. 513; Adwave Ex. 6 at 1). Mr. Gardner is not willing, because of the "severe" tax consequences, to sell his stock to a third party (Tr. 139, 225). Mr. Gardner and his wife propose to place their stock in a trust from which they would receive dividends, and retain the right to transfer the stock by gift or will, while giving voting control to the trustee (Tr. 137, 141). The terms of the trust agreements for Mr. Gardner's and Mrs. Gardner's stock are identical (Adwave Exs. 2 and 3).

16. As noted, Mr. Gardner contemplated placing his stock in a trust whereby he would relinquish voting control. However, Mr. Gardner asked his attorney, Wil-

21. Thus, at the time of the "B" cut-off, Mr. Gardner had no plan for meeting his divestiture commitment and did not undertake to develop one until after his deposition taken in April 1985 (Tr. 137-138, 474). George Gardner first spoke to his attorney about a voting trust sometime after April 1985 and a document (Adwave Ex. 2) was not drafted until the latter part of June 1985, after the exhibit and direct case exchange in this proceeding (Tr. 241).

22. The unexecuted trust document (Adwave Ex. 2) prepared by Mr. Gardner's attorney, William Martson (Tr. 507), contained the following relevant provisions:

- (1) Gardner would retain all net income of the trust, payable in quarterly installments (p. 1);
- (2) Gardner would retain the right to "demand" that the "principal of the trust, or any portion of the principal" be paid to third parties (pp. 1-2);
- (3) Gardner would retain the proceeds of any sale (p. 2);
- (4) Gardner would retain veto power over any sale, exchange or other disposition of the capital stock of Raystay (p. 2);
- (5) Gardner would retain the power to transfer the

27. Mr. Gardner would not be willing to make any divestiture commitment beyond what he had made because of the "taxes that would be involved. It would be a severe burden . . ." (Tr. 225.)

28. Mr. Gardner claims to regard the ownership characteristics of stock solely as the "voting ability" and does not consider that the enjoyment of the proceeds of the stock is an aspect of ownership (Tr. 166-166). In preparing the trust agreement, he discussed with his attorney,

the agreement that the trust is irrevocable (Tr. 420). Mr. Martson recognized, however, that there were several conditions under which the trust could be revoked (Tr. 444-425, 449-450).

35. Mrs. Gardner believes that the duration of the trust is for her lifetime, and that she cannot revoke it unilaterally, but she could not identify any provision of the agreement limiting her right to terminate the trust (Tr. 244-245). Mrs. Gardner has not signed the trust agree-

105. According to Dr. Reardon, in preparing for her deposition in May 1985, Mr. Joyce told her that "the RKO property was valued between 6-10 million" and that "financing would not be a problem." (Laudersea Ex. 7 at 2.) Furthermore, according to Dr. Reardon, Mr. Joyce confirmed her "ballpark estimates" of projected costs of construction at \$250,000 to \$300,000 and operation at \$50,000 per month (Laudersea Ex. 7 at 2). Dr. Reardon believed Mr. Joyce would know the value of RKO's equipment because he is an "expert" broadcasting lawyer (Tr. 627). Mr. Joyce could not remember discussing construction or operating costs with Dr. Reardon (Tr. 782). He did not remember her mentioning that construction costs would be \$250-300,000 or that operating costs would be \$50,000 (Tr. 825). The only figure he mentioned for the cost of facilities, \$700-800,000 was based on the estimates of another applicant in the proceeding (Tr. 783, 788).

106. Dr. Reardon does not know whether WAXY has an auxiliary power capability, and at the time she filed the amendment to her application on March 29, 1984, to stipulate that auxiliary power would be provided, she did not know what specific equipment would be required (Tr. 341; Adwave Ex. 8 at 17). She testified that she had an "estimate" of the cost but could not state the source of the estimate (Tr. 343). She simply believed that it was "not an excessive sum of money." (Tr. 647.) At that time Dr. Reardon had no budget for the proposed station (Tr. 649-650). She stated in the March 29, 1984, amendment that "she is financially qualified to provide this additional service." (Adwave Ex. 8.)

107. Dr. Reardon proposed to use the existing equipment of RKO (Tr. 625; Adwave Ex. 8 at 7-11). Dr. Reardon has never contacted RKO concerning the costs of acquiring RKO's equipment (Tr. 625-627). When Dr. Reardon filed her application, she had no written estimates for the costs to prosecute, construct or operate the proposed facility (Tr. 650). Her estimates of the costs involved were based on her limited conversations with Messrs. Siebert and Joyce (Tr. 626, 650; Laudersea Ex. 7 at 1).

108. On January 22, 1985, Dr. Reardon amended her application to enlarge her proposed full-time staff and again certified her financial qualifications (Adwave Ex. 8 at 18-21). In January 1985, Dr. Reardon did not have written cost estimates for the construction and operation of the proposed station. The only information she had was the "ballpark" figures she had obtained earlier from Messrs. Siebert and Joyce. She did not know what the additional costs of the enlarged staff would be (Tr. 640). Her financial ability and understanding of the Commission's financial requirement were the same as when she originally filed her application (Tr. 637-646). Dr. Reardon did not discuss her financial certification with anyone prior to her January 1985 amendment (Tr. 666). Mr. Joyce never asked her about the source of her financing prior to the January 1985 amendment (Tr. 668).

109. In her amendment filed on July 12, 1985, Dr. Reardon again certified her financial qualifications (Adwave Ex. 8 at 29-30). Dr. Reardon still had no written cost estimates. The cost estimates she had in her mind, \$50,000 to \$60,000 per month for operations and \$250,000 to construct, were "ballpark figures" based on previous conversations with Messrs. Siebert, Joyce and her husband (Tr. 630-631, 634; Laudersea Ex. 7, at 2). Dr. Reardon had no written budget or estimates of total costs

of construction and operation of the station from the time she applied in May 1983 until the January 1986 hearing on her financial qualifications (Tr. 650-651, 685, 695).

#### ULTIMATE FINDINGS AND CONCLUSIONS

110. This proceeding involves the application of RKO General, Inc. (RKO), licensee of WAXY-FM, Fort Lauderdale, Florida, and the applications of Adwave Company (Adwave), South Jersey Radio, Inc. (South Jersey), Cozzin Communication Corporation (Cozzin), and Rosemarie A. Reardon d/b/a Laudersea Broadcasting Company (Laudersea). Adwave, South Jersey, Cozzin and Laudersea seek to supplant RKO as the licensee of WAXY-FM. In this phase of the proceeding, the Commission has directed that the Presiding Judge prepare a Partial Initial Decision resolving the standard comparative issue as among the construction permit applicants who are challenging the renewal of RKO's license for WAXY-FM.<sup>10</sup> The Partial Initial Decision will also resolve the basic qualifying issues that have been specified against the permit applicants.

111. It is well recognized that only basically qualified applicants are entitled to comparative consideration. *Louis Adelman*, 29 FCC 1223 (1960), *affirmed sub. nom. Gurman v. Federal Communications Commission*, 297 F. 2d 782 (1961). Thus, it would be appropriate to first consider and resolve the basic issues before considering the comparative standing of the applicants.

#### Misrepresentation/Lack of Candor

##### re: Adwave's Divestiture Commitment

112. The facts regarding this issue are not in dispute. On March 27, 1984, the "B" cut-off date in this proceeding, Adwave filed an amendment wherein George Gardner stated that if Adwave is awarded a construction permit, "George F. Gardner and his wife, Marion [sic] Gardner, will divest themselves of all of the stock they own in Raystay Company." Raystay, a family corporation, owns and operates various cable television systems, and the divestiture commitment was made by Gardner to improve his comparative position in this proceeding. The commitment to divest appeared on its face to be unconditional and unequivocal and was repeated in the direct case exhibits offered by Adwave.

113. Despite the apparent unequivocal nature of the divestiture commitment, it was discovered during the course of this proceeding that neither Gardner nor his wife (who together own 76 percent of the voting stock of Raystay) have any intention of divesting themselves of their stock ownership of Raystay. Indeed, Gardner, at no time, had any intention of divesting himself in any meaningful way of his stock ownership or the benefits derived from such ownership. Rather, what Gardner had in mind was a trust arrangement whereby he would divest himself of voting rights to the stock. Because of the tax consequences, Gardner did not intend to sell the stock.

114. Not only did the trust arrangement, contemplated by Gardner, fail to satisfy his divestiture commitment, it permitted Gardner's retention of almost all indicia of ownership except for the right to vote the stock. Thus, the trust arrangement would enable Gardner to receive income from the stock the right to will or make a gift of the stock; and the right to approve the sale of the stock.

The proposed trust agreement contained no provision making it irrevocable by Gardner. Finally, Gardner appointed his personal attorney as the proposed trustee and intended to retain the management positions of president, treasurer, and a director of Raystay.

115. It is clear that the relinquishment of voting rights in a family corporation under the terms and conditions contemplated by Gardner can hardly satisfy the pledge he made in his "B" cut-off amendment that he and his wife would divest themselves of "all of the stock they own in Raystay Company." While Gardner claimed that he did not fully understand the meaning of "divest" and that he believed that all the Commission required was a relinquishment of "control," it is, nevertheless, apparent that the divestiture statements made by Gardner spoke in terms of stock ownership, not control. But even control of Raystay was not going to be meaningfully surrendered by Gardner who, as noted, would retain the position of president, treasurer and a director.

116. The Commission expects representations made in the comparative hearing process to be advanced in good faith. They are not to be put forth as a part of "gamesmanship" or for tactical advantage: They must be seriously advanced and seriously regarded in actual operation. *Tidewater Teleradio, Inc.*, 24 RR 653, 657 (1962). Indeed, a divestiture commitment cannot be abandoned by a winning applicant. *Alexander S. Klein, Jr.*, 88 FCC 2d 583, 586-587; 50 RR 2d 789 (1981)). Here, it must be concluded that Gardner misrepresented facts and/or was lacking in candor when he prepared and submitted his divestiture amendment and hearing exhibits, because he had no intention of meaningfully divesting himself of his stock ownership in Raystay. The pledge by Gardner was not made in good faith, but rather for the specific purpose of gaining a comparative advantage in this proceeding. Whether the conduct be considered a misrepresentation or a lack of candor, the result is the same. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127 (1983). Gardner has evidenced a willingness to deceive the Commission by his false divestiture commitment, and the Adwave application must be denied. *Bellingham Television*

Deceptive intent will be inferred from Gardner's deceptive conduct.<sup>11</sup> Moreover, it is not credible to accept Gardner's explanation that he thought he could satisfy his divestiture commitment by surrendering voting control to an appointed trustee of a trust, which he contemplated establishing.<sup>12</sup> The arrangement which Gardner envisioned, as previously noted, would not have divested either ownership or control of Raystay. If not a total sham, then the proposed trust arrangement as contemplated by Gardner certainly bordered on a sham insofar as being a legitimate Commission divestiture device. Finally, even under *Attribution of Ownership Interests*, Gardner could not have been considered a passive investor because he would have retained the positions of president, treasurer, and a director of Raystay. How, *inter alia*, the chief executive officer of a company owning cable interests can be considered a "passive investor" is not explained by Adwave.

#### LAUDERSEA

##### Cost Estimate Issue

118. The question raised by this issue is whether Laudersea can put its proposed station on the air for less than the one million dollars which has been shown to be available. The findings reflect that Laudersea's total construction and operation costs will be approximately \$738,684. Even if the estimated additional \$100,000 in anticipated and expended prosecution costs were to be met out of the loan rather than paid currently, there would still remain a cushion of over \$150,000. Thus, the bank loan presently available to the applicant is sufficient to meet Laudersea's anticipated costs and, accordingly, the applicant is financially qualified.

119. While Laudersea may now be found financially qualified, as will be seen below, it was not so qualified when the application was filed. Indeed, Laudersea misrepresented its financial qualifications in its application and it continued to remain financially unqualified for a period of two years, or until it secured the bank loan



false statement, and her plea for exoneration on the basis of her "unique" interpretation of financial qualification is rejected. Applicants who falsify statements regarding their financial qualifications have in the past been disqualified. *Las Americas Communications, Inc.*, 1 FCC Rcd 786 (1986). There is no good reason for a different result here.

128. It is significant to note that Dr. Reardon has now conceded that she had no commitment from Mr. Birkeland. Nevertheless, she falsely represented in a statement filed in opposition to an enlargement request that she saw her conversation with Birkeland "as a firm commitment from a committed source . . ." <sup>15</sup> Moreover, when preparing for depositions, Dr. Reardon told Mr. Joyce, her lawyer at the time, that she had an oral commitment from a banker, and that Mr. Birkeland would provide the funds. Dr. Reardon knew, or should have known, that these statements were false because Mr. Birkeland in no way had committed his bank to provide any funds to the applicant. <sup>17</sup> The proclivity of Dr. Reardon to fabricate facts to suit her own convenience and objectives further supports the conclusion that her self-styled "unique" interpretation of the financial questions is nothing but a transparent, disingenuous *post hoc* rationalization of her failure to do anything before certifying that she was financially qualified.

#### COZZIN COMMUNICATION CORPORATION

129. The identical issues specified against Cozzin in the RKO Boston case were also specified against Cozzin in this case. When those issues were specified, it was made clear that they would be litigated in the Boston RKO case, and the findings of fact and conclusions of law would be adopted and incorporated herein by reference, subject, of course, to the usual Commission review procedures. (See, FCC 85M-890 and FCC 85M-1076.)

130. On July 17, 1986, the Presiding Judge in the Boston RKO proceeding issued an *Initial Decision* (FCC 86D-47). Therein, in paragraphs 5 through 9, the Presiding Judge disqualified Cozzin. The findings and conclusions relating to such disqualification are incorporated herein by reference, and Cozzin is also disqualified in this proceeding.

#### Comparative Issue

131. The applications of Adwave, Lauderdale, and Cozzin have been disqualified for the reasons previously stated. As a result, South Jersey Radio, Inc., is the only remaining construction permit applicant. Thus, its application will be the one to contest the renewal application of RKO in any further proceeding ordered by the Commission.

132. If it be assumed that all applicants are basically qualified, the following evaluation is made regarding the comparative standing of all the applicants.

133. Evaluation of comparative applications is governed by the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 3,93 (hereinafter *Policy Statement*). In the *Policy Statement*, the Commission established the two primary objectives toward which the process of comparison should be directed: (1) the best practicable service to the public; and (2) a maximum diffusion of control of the media of mass communications.

#### Diversification

134. The *Policy Statement* describes diversification of control of the media of mass communications as "a factor of primary significance...." (Id. at 394.) In evaluating the significance of media interests under diversification, media holdings in the proposed community of license will normally be of most importance, followed by other interests in the remainder of the service area, and finally, by interests in the nation generally. (*Policy Statement* at 394-395.) Other important factors to weigh are the degree of the applicants' ownership and control in these media, and their significance in terms of size and coverage, and in relationship to other media in their respective areas. Control of large interests elsewhere in the state or region may outweigh control of a small medium of expression (such as weekly newspaper) in the same community. The media interests of the applicants must be evaluated with the above principles in mind.

135. It is apparent from the findings that South Jersey ranks last on the diversification criteria. South Jersey wholly owns an AM, an FM, and a TV station, as well as a weekly newspaper; all located in the southern New Jersey region. A similar combination of media interests is owned by South Jersey in upstate New York. Specifically, South Jersey wholly owns an AM/FM/TV combination in Elmira, and an AM/FM combination in Rome, New York, about 100 miles from Elmira. It is thus apparent that South Jersey has extensive media holdings in New Jersey and upstate New York which place it last on the diversification criteria when compared to the other applicants.

136. Cozzin is the permittee of an LPTV facility at Alachua, Florida. While it is wholly owned, it is outside the service area of the Fort Lauderdale station. This media interest is of minimal significance.

137. George F. Gardner, the sole owner of Adwave, is also the president, treasurer, and controlling (50.1 percent of voting stock) stockholder of Raystay, which owns and Operates several cable television systems serving, or franchised to serve, areas in Pennsylvania, Maryland and West Virginia. Marian Gardner, Mr. Gardner's wife, is secretary and a substantial (25.9 percent of voting stock) stockholder of Raystay. Mrs. Gardner's interests must be attributed to Mr. Gardner for diversification purposes under well settled Commission policy, because of the "clear community of interest" between marital partners. *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 426 (1981). The Gardners have made no effort to rebut this presumption by showing that the presumed privity of interest between them is lacking. See, e.g., *Cannon Communications Corporation*, 101 FCC 2d 169, 178-179 (Rev. Bd. 1985).

138. The method by which Mr. and Mrs. Gardner propose to "divest" themselves of their Raystay stock has previously been discussed. Specifically, it is the intention of the Gardners to place voting control of their stock in the hands of a trustee. The trust does not yet exist, but its proposed terms are set forth in the Findings and have previously been discussed under the divestiture misrepresentation issue.

139. Based on the Findings, it is concluded that there will have been no real change in the control of Raystay should the trust arrangement ever become effective. The Commission has never accepted such a meaningless exercise as constituting a divestiture of a media holding. For example, in *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944 (Rev. Bd. 1982), the Review Board ruled that a